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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Deferral of Licensing of MTA	)	GN Docket No. 93-253
Commercial Broadband PCS	)	ET Docket No. 92-100

To: The Commission

DOCKET FILE COPY ORIGINAL

APPLICATION FOR REVIEW

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July 21, 1995

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SUMMARY
OF
APPLICATION FOR REVIEW

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), Percy E. Sutton, Individually ("Sutton"), and the National Association for the Advancement of Colored People Washington Bureau ("NAACP"), (collectively referred to as the "Minority Petitioners"), request review of the Order released on June 23, 1995, by the Chief, Wireless Telecommunications Bureau in the above-captioned proceeding, denying that portion of the Minority Petitioners' Application for Review filed on May 12, 1995. The Minority Petitioners' May 12, 1995 Application for Review requested the Commission to reverse the Wireless Telecommunications Bureau's decision in its order released on April 12, 1995, which denied the "Emergency Motion to Defer MTA PCS Licensing" filed on March 8, 1995, by Communications One, Inc. The Minority Petitioners requested the Commission to reverse its April 12, 1995 decision in the Communications One, Inc. matter and stay the licensing of the A and B block broadband frequencies until the Commission is ready to license the C block frequencies.

The Minority Petitioners submit that the Bureau's June 23, 1995 Order fails to comply with the Commission's obligations under Section 309(j) of the Communications Act, 47 U.S.C. Section 309(j). Pursuant to Section 309(j), the Commission is obligated to: (1) avoid excessive concentration of licenses in PCS, (2) disseminate licenses to a wide variety of applicants, specifically including businesses owned by members of minority groups, and (3) promote economic opportunity for businesses owned by members of minority groups. If the Commission licenses A and B block PCS frequencies before the Commission is ready to license C block frequencies, the Commission will violate its statutory obligations under Section 309(j). Such licensing will place C block licensees at such a substantial competitive disadvantage that prospective C block licensees will be unable to raise capital to create viable businesses in competition with the A and B block winners.

The Commission's decision not to take any steps to further its statutory obligation to promote minority ownership in the A and B licenses has resulted in a situation in which the Commission is failing to comply with its statutory obligation to promote minority ownership. The ongoing delays in the licensing of C block frequencies will leave prospective licensees in this block with no viable business opportunities. This situation would have been avoided if the Commission had complied with its statutory obligation in all frequency blocks including the A and B blocks -- rather than to relegate its compliance to a limited frequency "ghetto" in the C and F blocks.

In addition, 61% of the A and B block licenses were obtained by three bidding entities comprised of combinations of the companies which already dominate control of the communications industry. Moreover, the bidding in which these entities engaged exhibited clear indications that there was a tacit agreement to avoid significant bidding against each other and to engage in a territorial allocation of the A and B licenses among themselves. An investigation of this conduct should also be performed before the A and B blocks are licensed.

This situation is exacerbated by the likelihood that the C block auctions that are now scheduled to begin on August 29, 1995 will not actually begin on that date. The C block auctions have been caught up in a series of legal challenges which show no immediate likelihood of abating. Licensing the A and B block frequencies while the C block auctions have yet to begin and while the C block continues to be threatened with additional delays will place the prospective C block licensees at a competitive disadvantage so great that it would amount to an abrogation of the Commission's statutory obligation under Section 309(j).

The Minority Petitioners submit that we are likely to prevail on the merits of our appeal, we will be irreparably harmed by denial of the requested stay, others will not suffer substantial harm by grant of the requested stay, and a stay will serve the public interest. Therefore the requested stay should be granted.

TABLE OF CONTENTS

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To: The Commission

APPLICATION FOR REVIEW

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), Percy Sutton individually ("Sutton"), and the National Association for the Advancement of Colored People, Washington Bureau ("NAACP") (collectively referred to herein as the "Minority Petitioners"), by their attorneys, pursuant to Sections 1.115, 1.43 and 1.44(e) of the Commission's Rules and Regulations, hereby file this Application for Review of the Order released June 23, 1995 (the "June 23, 1995 Order") by the Chief, Wireless Telecommunications Bureau (the "Bureau Chief") in the above captioned proceeding denying the Minority Petitioners' Application for Review filed on May 12, 1995. Order, DA 95-1410 (released June 23, 1995). In the May 12, 1995 Application for Review, the Minority Petitioners requested the Commission to reverse the Wireless Telecommunications Bureau (the "Bureau") decision in its Order released April 12, 1995 (the "CommOne Order") which denied the "Emergency Motion to Defer MTA PCS Licensing" filed March 8, 1995 by Communications One, Inc. ("CommOne").[1] The Minority Petitioners requested the Commission to reverse the CommOne Order's decision and to stay the licensing of the A and B block broadband frequencies until the Commission is ready to license the C block frequencies.

In its Emergency Motion, CommOne had requested that the Commission defer licensing of

[1] In the June 23, 1995 Order, the Bureau Chief decided to treat the May 12, 1995 Application for Review as a motion for reconsideration because the Bureau Chief determined that it relied on "questions of fact or law on which the designated authority has been afforded no opportunity to pass," citing Section 1.15(c) of the Commissions Rules.

the A and B blocks in the 2 GHz Broadband Personal Communications Service ("PCS") because the United States Court of Appeals for the District of Columbia Circuit had imposed a stay on the auctioning of frequencies for C block licenses. The CommOne Order had held that the existence of a stay of the C block auctions did not require the Commission to stay the licensing of the A and B blocks. CommOne Order at 3.

In the June 23, 1995 Order, the Bureau Chief held that the May 12, 1995 Application for Review was untimely to the extent that it sought reconsideration of the Commission's rules adopted in PP Docket No. 93-253 with respect to the structure and sequencing of PCS auctions. June 23, 1995 Order at 9. The June 23, 1995 Order therefore treated the May 12, 1995 Application for Review as a request for reconsideration of the CommOne Order's denial of CommOne's request for a stay. June 23, 1995 Order at 9-10.[2] The Bureau Chief then held that the Application for Review failed to satisfy the four prong preliminary injunction test of Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977) ("Holiday Tours"). June 23, 1995 Order at 10-15.

The Minority Petitioners submit that the Bureau Chief's CommOne Order and June 23, 1995 Order both fail to recognize the Commission's statutory obligation with respect to the conduct of the broadband PCS auctions, and are in fact violative of that statutory obligation and misapply the four prong Holiday Tours test. In fact, the requested stay must be issued if the Commission is to comply with its statutory obligation.

The requested stay must also be issued because serious restraint of trade issues have been raised by the A and B block auctions, and the stay is necessary to prevent irreparable injury to the

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[2] The May 12, 1995 Application for Review did not seek reconsideration of the Commission's rules adopted in PP Docket No. 93-253 with respect to the structure and sequencing of PCS auctions and was limited to seeking reconsideration of the CommOne Order's decision denying CommOne's request for a stay. The Request for a Stay sought the same ultimate relief: a stay of the licensing of the A and B block PCS frequencies until the Commission is ready to license the C block frequencies. Thus, the Bureau Chief's decision to treat the May 12, 1995 Application for Review as a request for reconsideration of the decision denying CommOne's request for a stay was correct.

public interest which the activities in restraint of trade have created. The Minority Petitioners therefore request that the Commission reverse the Bureau Chief's decisions in the CommOne Order and the June 23, 1995 Order and stay the licensing of the A and B block frequencies until the Commission is ready to license the C block frequencies.

In support of the instant Application for Review, the Minority Petitioners submit the following:

I. STANDING

The Minority Petitioners have standing. NABOB is a national trade association representing the interests of current FCC licensees, primarily in the broadcast industry, and prospective minority applicants in the PCS auctions. Percy E. Sutton is an African American, a resident of the State of New York, and a citizen of the United States, planning to bid for C block PCS licenses. The NAACP is the nation's oldest and largest civil rights organization, and its Washington Bureau represents the interests on a national basis of: (1) minority entrepreneurs who plan to bid in the PCS auctions, and (2) the public, which will be harmed if the PCS industry does not develop into an open competitive industry.

NABOB and the NAACP have a particular interest in the nation's rapidly evolving telecommunications policy. As with other Americans, African Americans will benefit from the potential of the "information superhighway" only if that potential is realized in our communities. NABOB and the NAACP have been active in fostering an awareness and appreciation of evolving communications technologies within the African American community and in representing the interests of prospective applicants and consumers before the Commission, Congress and the Executive Branch. NABOB has filed numerous pleadings in this proceeding. Therefore, the Minority Petitioners have standing to file this Application for Review and Request for Stay. See United Church of Christ v. FCC, 359 F.2d 994, 1005, 53 RR2d 2001, 2013-2014 (D.C. Cir. 1966); Michael Matheson et. al., 53 RR2d 997, 998 (1983); Baltimore Area Renewals, 89 FCC 2d 1183, 51 RR2d 727 (1982); and Golden State Broadcasting Corp., 71 FCC 2d 1284, 45 RR 2d 949, 950

(1979).

II. BACKGROUND

A. Congress Directed the FCC to Promote Opportunities for Minorities to Acquire PCS Licenses

In 1993, Congress passed the Omnibus Budget Reconciliation Act which included Section 309(j) of the Communications Act, 47 U.S.C. Section 309(j).[3]

It is clear from a plain reading of Section 309(j) that the FCC has a statutory obligation in

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[3] Section 309(j) provides, in pertinent part, as follows:

(1) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of the competitive bidding system. ... the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(a) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, <u>without administrative or judicial delays</u>;

(b) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people <u>by avoiding excessive concentration of licenses</u> and by <u>disseminating</u> licenses among a <u>wide variety of applicants</u>, including small businesses, rural telephone companies, and businesses owned by members of <u>minority groups</u> and women ...

(2) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall-

(a) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that <u>promote</u> (I) an equitable distribution of licenses and services among geographic areas, (ii) <u>economic opportunity for a wide variety of applicants</u>, including small businesses, rural telephone companies and businesses owned by members of <u>minority groups</u> and women, and (iii) investment in rapid deployment of new technologies and services;

(b) ensure that small businesses, rural telephone companies, and businesses owned by members <u>of minority groups</u> and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures . . .

(Emphasis added).

its PCS auctions to: (1) avoid administrative and judicial delays, (2) avoid excessive concentration of licenses, (3) disseminate licenses to businesses owned by minorities and women, and (4) promote economic opportunity for businesses owned by minorities and women. Nothing in the legislation suggests that the Commission is free to ignore three of these statutory mandates in order to promote the fourth. As shall be demonstrated below, a grant of the requested stay is necessary for the FCC to comply with its entire statutory mandate.

B. Section 309(j) Was Needed to Enable Minority Owned Businesses to Compete with the Carriers for Whom Cellular Telephone Licenses Were "Set-Aside"

The adoption of Section 309(j) grew, in part, from an earlier Commission action which sought to encourage the development of the cellular telephone industry. The FCC "set-aside" one of the two available cellular frequencies in each market and reserved them for the wireline carriers of each community. An Inquiry Into the Use of the Bands 825-845 MHZ and 870-890 MHZ for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 49 RR2d 809, 821-826 (1981). In most markets, this meant that the FCC's preferences went to the local telephone companies of the then AT&T/Bell System, now known as the Regional Bell Operating Companies ("RBOCs"). Id. Given this affirmative government assistance, the wireless telephone side of the RBOCs businesses are now booming. However, there is virtually no minority ownership presence in the wireless telephone industry, largely as a result of discriminatory lending practices. See Implementation of Section 309(j) of the Communications Act, Competitive Bidding, 8 FCC Rcd 7635, 7648 (1993), citing the "FCC Small Business Advisory Committee (SBAC) Report to the Federal

Recently, the FCC's programs to enhance minority ownership within the broadcast industry have been unjustly criticized by some as improper "set-asides." This is especially ironic given that the revenues of the multibillion dollar cellular industry are going into the coffers of the traditional wireline carriers because they received the largest "set-aside" in the history of the Communications Act. The bleak record of minority participation in the common carrier services is a direct reflection of the disproportionate control that the RBOCs and long distance carriers have maintained over the industry.

It was against this backdrop that Congress directed the Commission to develop procedures and incentives to encourage the entry of minorities and other "designated entities" into what is essentially a segregated industry.

C. The C Block Auction Will Begin No Earlier Than August 29, 1995

In the May 12, 1995 Application for Review that was denied by the Bureau Chief in the June 23, 1995 Order, the Minority Petitioners asserted that it was unlikely that the C block auction would actually begin on August 2, 1995. May 12, 1995 Application for Review at 6. This prediction became reality when, on July 18, 1995, the Commission delayed the commencement of the C block auction until August 29, 1995. Sixth Report and Order in PP Docket No. 93-253, et al., FCC 95-301 (released July 18, 1995).

The history of this proceeding strongly suggests that there will be additional delays before the auction actually commences. The Commission released a Notice of Proposed Rule Making in this proceeding on October 13, 1993, proposing rules for the auctioning of PCS frequencies. Implementation of Section 309(j) of the Communications Act, Competitive Bidding, 8 FCC Rcd 7635 (1993). On June 29, 1994, the Commission adopted rules for the auction of broadband PCS licenses in a series of auctions. See, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532 (1994) ("Fifth R&O").

As part of its rules, the Commission:

- Reserved two "entrepreneurs" blocks, the C and F blocks[4], for bidding only by companies with annual revenues below $125 million; controlled by "designated entities," divided into geographic divisions known as basic trading areas (BTAs);

- Extended to minorities and women eligible for the entrepreneurs blocks a bidder's credit of up to 25% -- in theory, a significant discount off the winning auction bid for an entrepreneurs block license;

- Allowed larger firms to make non-majority, non-controlling equity investments in companies owned by minorities and women without voiding those companies' eligibility to bid for the entrepreneurs blocks; and

- Extended tax certificates to entities that invest in PCS firms owned by racial minorities and women, or that sell licenses to such businesses.[5]

9 FCC Rcd at 5580.

The Commission announced that there would be an initial auction of A and B block licenses for MTA frequencies. 9 FCC Rcd at 5546-5547. However, no provision was made in those auctions to encourage participation by minorities, women, small businesses and rural telephone companies, although such participation in the Commission's auctions is required by the Omnibus Budget Reconciliation Act which provided the Commission statutory authority to conduct such auctions. See, e.g. 47 U.S.C. § 309(j)(4)(D).

The Commission stated that it would comply with the statutory directive to make opportunities available for the designated entities by holding subsequent auctions for the C and F block licenses where it would implement its rules to encourage participation by the designated entities. Fifth R&O, 9 FCC Rcd at 5546-47.

On September 19, 1994, the Commission announced it would begin A and B block auctions

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[4] In designing the PCS frequency allocation plan, the Commission had previously created six frequency blocks -- A, B, C, D, E and F. Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957, 4970 (1994).

[5] Congress recently repealed Section 1071 of the Internal Revenue Code which authorized the Commission to issue tax certificates. Section 2, H.R. 831, Self-Employed Health Act, signed by the President in April, 1995. Therefore, tax certificates are no longer available for PCS investors.

on December 5, 1994. FCC Public Notice released September 19, 1994. On December 23, 1994, the Commission announced that it would begin C block auctions on April 17, 1995.

On February 10, 1995, the Commission announced that the C block auctions would be postponed and would commence 75 days after the conclusion of the A and B block auctions. FCC Public Notice released February 10, 1995.

On March 13, 1995, the Commission announced that the A and B block auctions had been completed. FCC Public Notice released March 13, 1995. It appeared that auctioning of the C block would begin as scheduled.

However, on March 15, 1995, the U.S. Court of Appeals issued a stay of the C block auctions as the result of an appeal filed by Telephone Electronics Corporation ("TEC"), a rural telephone company. Telephone Electronics Corporation v. FCC, No. 95-1015 (D.C. Cir., March 15, 1995). TEC alleged in its appeal that the Commission's size limitation rule, which would preclude TEC from bidding in the C and F block auctions, was arbitrary. TEC Petition for Review, filed January 6, 1995, at 2. The Commission announced that the auctioning of the C block frequencies would be suspended until the stay was lifted. FCC Public Notice released March 15, 1995.

On March 28, 1995, TEC filed a "Request for Waiver of Section 24.709(a)(1) of the Commission's Rules," seeking a waiver of the size limitation rule ("TEC Waiver Request"). On April 14, 1995, a TEC subsidiary, Bay Springs Telephone Company, Inc., along with PCS Primeco L.P. and Peterson County Communications, L.P. filed a request with the Commission for approval of a partitioning plan which rendered moot TEC's Request for Waiver. Letter to William F. Caton, Secretary, FCC, from Bay Springs Telephone Company, Inc. et al., April 14, 1995. On April 18, 1995, the Commission approved the partitioning plan. Partitioning Plan of Bay Springs Telephone Company, PCS Primeco, L.P. and Peterson County Communications, L.P., Declaratory Order, DA 95-865 (released April 18, 1995). On April 19, TEC moved to dismiss its Petition for Waiver.

On May 1, 1995, the Court of Appeals dissolved the stay. Telephone Electronics Corporation v. FCC, No. 95-1015 (D.C. Cir. May 1, 1995). The Commission rescheduled the C block auctions to begin August 2, 1995.

On June 12, 1995, the Supreme Court of the United States issued its decision in Adarand Contractors , Inc. v. Peña , 63 U.S.L.W. 4573 (U.S. June 12, 1995). On June 23, 1995, the Commission adopted a Further Notice of Proposed Rulemaking which proposed changes to the rules governing the C block auctions to totally eliminate all race- and gender-based aspects of the rules and to delay the scheduled August 2, 1995 start date for the C block auction.

On July 18, 1995, the Commission amended the Rules for the C block auction and set August 29, 1995 as the date for starting the C block auction. When it amended its C block rules, the Commission asserted its belief that, even though it had eliminated all race- and gender-based measures from the C block auction rules, minority and women bidders still somehow will "have a better chance of becoming successful PCS providers." Sixth Report and Order in PP Docket 93-253, et al., at 6.

It now appears that the Commission's decision not to include any incentives for minority ownership in the auction rules for the A and B block licenses may result in a complete failure to comply with its statutory mandate under Section 309(j). The auctioning of C block licenses remains under a cloud.

III. THE COMMISSION HAS FAILED TO COMPLY WITH ITS STATUTORY MANDATE

A. The Commission's Decision to Provide No Incentives for Minority Ownership in the A and B Block Auctions Has Resulted in a Failure to Comply with Its Statutory Mandate

The uncertainty surrounding the timing of the C block auctions is traceable to the Commission's decisions: (1) to auction A and B block licenses separate from the C block licenses, (2) to auction the A and B block licenses prior to auctioning the C block licenses, and (3) to include no incentives for bidding by the designated entities in the A and B block auctions. NABOB opposed each of these decisions. In particular, as early as November 10, 1993, NABOB urged the Commission to apply any policies designed to promote minority ownership to all frequencies to assure that minorities were not relegated to a few inferior frequencies. NABOB Comments filed November 10, 1993 at 9-10. However, the Commission disregarded NABOB's request, and now the result predicted by NABOB is upon us.

Each day that the A and B block licenses are granted ahead of the C block licenses will reduce the value of the C block licenses. The Commission has received a great deal of information from various sources in this proceeding stressing the importance of providing incentives to enable minority owned companies to become viable competitors in the PCS industry, Fifth R&O, 9 FCC Rcd at 5571-5579. The Commission's efforts to address that problem will be eviscerated if the Commission licenses A and B block frequencies before the Commission is ready to license C block frequencies. If the Commission's C block auctions are delayed and the licensing of the A and B block frequencies continues without being stayed, the A and B block licensees will gain such a tremendous headstart that they will preempt the market from prospective C block licenses. Unlike television stations and radio stations, the average consumer has no need for more than one wireless telephone licensee. Once the A and B block winners have obtained a substantial headstart, there will be little opportunity for persons interested in purchasing C block frequencies to develop a successful business. This is especially true given the dominant position in the telephone industry already held by the large winners of the A and B block licenses.

The result will be that the Commission will have created a PCS industry in which there will be an "excessive concentration of licenses" in the hands of the large A and B block winners, there will be no "dissemination" of licenses to businesses owned by members of minority groups, and the Commission will have failed to "promote economic opportunity" for businesses owned by members of minority groups, as required by Section 309(j). A stay of the licensing of the A and B block licenses is necessary to prevent this illegal result.

Therefore, the Commission has a statutory obligation to stay the licensing of the A and B block frequencies until the C block frequencies are ready for licensing.

B. The Commission's Decision to Provide No Incentives for Minority Ownership in the A and B Block Auctions Allowed the Dominant Carriers to Divide PCS Licenses in an Unlawful Territorial Allocation

When the FCC first began its rulemaking for the PCS auctions, the field of prospective bidders consisted of numerous companies that appeared to be logical competitors for the PCS licenses: AT&T, McCaw Cellular, NYNEX, Bell Atlantic, U.S. West, Air Touch Communications, Sprint, TCI, Cox Communications, Comcast, MCI, Ameritech, Bell South, GTE and Southwestern Bell.

However, when applications were received by the FCC for its A and B frequency blocks on October 24, 1994, this list of prospective "competitors" had consolidated itself into a mere handful:

1. AT&T had acquired McCaw Cellular and turned it into AT&T Wireless PCS, Inc.;

2. Three RBOCs -- NYNEX, Bell Atlantic and U.S. West -- joined with Air Touch Communications to form PCS Primeco, L.P.; and

3. Sprint, TCI, Cox Communications and Comcast came together to form Wireless Co., L.P and Phillie Co., L.P. (Comcast did not participate in Phillie Co., L.P.)

This occurred even though the Commission's PCS rules provided incentives for existing telecommunications companies to enter into strategic partnerships with designated entities -- partnerships which were envisioned to permit both entities to maximize their positions in the licensing process and the industry. Given the previously stated intention of several major bidders, including several of the RBOCs, to develop "national foot-prints" within the PCS industry, it was anticipated that the spectrum blocks for which they could bid would not provide enough license capacity for the many anticipated bidders.

The FCC reasoned that seeking additional frequency access, the bidders in the A, B, D and E blocks would turn to the C and F blocks for the purpose of mutually beneficial joint ventures with designated entities. 9 FCC Rcd at 5579. By partnering with an existing telephone company, the designated entity could avoid being stymied in the start-up of its company by existing competitors who might deny access to telephone interconnection, deny sharing of facilities, overprice shared facilities, interfere with the development of important equipment vendor relationships or take other steps to thwart new competition.

The FCC and many designated entity companies spent much of 1993 and 1994 working to develop procedures which would facilitate joint ventures without allowing the existing telecommunications companies to control and dominate these joint ventures. Unfortunately, while the FCC and the designated entities were moving in one direction toward support of the Commission's diversity of ownership policy, certain of the existing telecommunications companies were working to join forces to keep the designated entities from entering their markets. It appears that they have succeeded. Thus, the FCC's plan for a truly competitive auction of PCS licenses was subverted long before the opening auction gavel ever fell.

The PCS bidding for the A and B frequencies took on the classic characteristics of a "territorial allocation," an unfair business practice under existing antitrust law. See, United States v. Topco Associates, Inc., 405 U.S. 596 (1972); Hobart Bros. Co. v. Malcolm T. Gilliand, Inc., 471 F.2d 894 (5th Cir.), cert. denied, 412 U.S. 923 (1973); United States v. American Smelting and Refining Co., 182 F. Supp. 834 (S.D.N.Y. 1960). Companies which, if bidding separately, would have been expected to compete for licenses covering several geographic areas, instead, by joining their competitors, bid for only those markets not already controlled by their new partners -- i.e. their former competitors. Moreover, the activity of the aligned RBOCs appears particularly anti-competitive, since they did not bid in markets where any other RBOC was bidding. This appeared to reflect an "I won't bid against you, if you don't bid against me" understanding.

Further, having joined with their new partners/former competitors to bid for only a handful of PCS licenses in areas not already controlled by their new partners, these major telecommunications companies have been able to gain control of virtually all of the PCS frequencies they desire in the A & B frequency block auctions, without ever joining with minority owned companies in the C block auctions.

The result is that in the A and B block auctions there were only five winners for the 17 licenses available in the top ten markets, and only 10 winners for the 37 licenses available in the top twenty markets.

In the top twenty markets, AT&T had 10 high bids; Wireless Co had 11; and PCS Primeco had 7 high bids. Of the 99 licenses auctioned, Wireless Co won 29, AT&T won 21 and PCS Primeco won 11, representing 61% of the licenses auctioned. These companies effectively divided the most lucrative markets in America among themselves. Moreover, when combined with their current wireline telephone, cellular and cable holdings, the major telecommunications companies have positioned themselves to dominate the wireless telephone industry, both PCS and cellular.

It should be noted that several of the companies engaged in these partnerships are not new to U.S. Justice Department antitrust inquiry. AT&T was compelled under federal court order to divest its local telephone monopoly because of its anticompetitive conduct. United States v. AT&T, et. al., 103 S.Ct. 1240 (1982) (the "Modified Final Judgment" or "MFJ"). The acquisition of McCaw Cellular and PCS licenses across the country will allow AT&T to recreate many aspects of its local telephone monopoly to the potential detriment of the national interest.

Similarly, PCS Primeco, consisting of NYNEX, Bell Atlantic, U.S. West, and an RBOC-spin-off, Air Touch Communications, is another cluster of companies with preexisting anticompetitive relationships. Moreover, while AT&T sought and obtained U.S. Justice Department approval for its acquisition of McCaw, neither NYNEX, Bell Atlantic, U.S. West, nor Air Touch Communications obtained prior approval for their partnership. Given the Justice Department determination that Air Touch is subject to the MFJ, this amounts to a combination of more than half of the former Bell Operating Companies operating as a single PCS license holder.

The consolidation of competitors in the telephone industry for the purpose of the PCS auctions has had a "chilling effect" on the ability of minorities to enter into the PCS industry. Minorities seeking to bid for C and F block licenses must now convince financial institutions and investors that they can effectively compete against competitors consisting of financially well-positioned RBOCs, long distance carriers and cable companies. It is increasingly likely that few African American owned or other minority owned companies will be able to raise the capital necessary to successfully compete against these new alliances.

IV. THE MINORITY PETITIONERS' APPLICATION FOR REVIEW MEETS THE FOUR-PRONGED TEST FOR GRANTING A STAY

The issue in the instant Application for Review is whether the Commission should stay the issuance of the A and B block licenses. The Commission must evaluate a request for stay pursuant to a four-pronged test established by the courts. To prevail, the Minority Petitioners must demonstrate that: (1) it is likely we will prevail on the merits; (2) we will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors grant of a stay. See, Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

The D. C. Circuit has made it clear that, where the movant demonstrates that the balance of hardships tips decidedly in its favor (i.e., the movant will suffer serious irreparable injury while the non-movants will not suffer equal or greater hardship) and the public interest will be served by the issuance of a stay, the movant does not have to also demonstrate a probability of success on the merits. Instead, all that the movant must show in such circumstances is that the movant has made a substantial case on the merits. Holiday Tours, 559 F.2d at 883.

The D.C. Circuit has summarized this holding as follows:

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision after a trial, be absolutely certain, wholly without doubt; if other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.

Id. at 884 (quoting, Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) (emphasis added).

As shall be demonstrated below, the Minority Petitioners' request meets these requirements.

A. The Minority Petitioners will be Irreparably Harmed by Denial of the Requested Stay

The Minority Petitioners and the prospective bidders they represent will be irreparably harmed by a denial of the requested stay. The Commission's prior orders in this proceeding have discussed in great detail the competitive advantages of the larger carriers, which have been the principal winners of the A and B block auctions. See, e.g. Fifth R&O, 9 FCC Rcd at 5536-40 and 5571-81. The Commission's rules restricting bidding by large companies in the C block auctions were specifically designed to help minorities overcome the competitive disadvantage they face in comparison to the larger companies. The CommOne Order and the June 23, 1995 Order both completely ignore the record on this issue.

Among the injuries which prospective C block bidders will experience are:

1. Loss of Access to capital. Investors will be disinclined to invest in C block licenses if the timing of bidding is substantially behind the recently concluded A and B block bidding. See, PCS Week, February 22, 1995, at 1, 4.

2. Loss of base station cell sites. It must be remembered that the C block winners will be licensed for areas in which the A and B licensees are also located. Thus the C block winners will be competing directly with the winners of the A and B blocks. A and B block licensees will be able to enter into purchase or lease agreements for prime base station locations precluding subsequent C block licensees from obtaining access to those sites, and thereby possibly precluding C block licensees from being able to serve some geographic areas at all.

3. Loss of access to distributors and retailers. The A and B block licensees will be able to enter into distribution, resale and other agreements with the preferred business establishments in a geographic area. Again, it must be

remembered the C block winners will be in direct competition with the A and B block winners.

4. Loss of market share. By getting to market first the A and B block licensees will be able to develop a substantial customer base before the C block licenses are issued. Thus, the C block winners will be at a severe disadvantage in competing against the A and B block winners.

Of the disadvantages listed, loss of access to capital has been recognized in the Commission's prior orders as a serious difficulty for minorities. See, e.g. Fifth R&O 9 FCC Rcd at 5572-74. As a result of the uncertainty surrounding the auction timetable for C block licenses, the disadvantage experienced by minorities in raising capital has been exacerbated. If minorities experience an inability to access capital resulting from the impending licensing of the A and B block frequencies, combined with the delay of the C block auctions, this is the same as denying minorities an opportunity to participate in PCS. Therefore, minorities will be irreparably harmed by the planned rapid licensing of A and B block frequencies.

The June 23, 1995 Order concluded that the Minority Petitioners' claims of irreparable injury are "speculative." However, in doing so, the June 23, 1995 Order engaged in its own speculation that stands in conflict with the Commission's prior determinations outlined above.

B. Others Will Not Suffer Substantial Harm by Grant of the Requested Stay

The requested stay will not substantially harm any other party. The only parties who would be affected by the stay are the winners of the A and B block auctions. Those parties will experience no significant prejudice as a result of the grant of a stay. The A and B block winners are not currently conducting PCS business. Therefore, the stay will not prevent them from engaging in a current business enterprise. Moreover, the A and B winners are not required to pay the remaining 80% balance of their auction payments until the FCC grants their licenses. 9 FCC Rcd at 5563.

Therefore, the delay will not require them to incur any additional FCC auction license expense until the stay is lifted.

Ironically, at the same time the June 23, 1995 Order asserted that the claimed irreparable injury to block C auction participants caused by the delay period between the grant of the A and B block licenses and the grant of the C block licenses is "speculative," the June 23, 1995 Order expressed concern that a delay in the grant of the A and B block licenses will cause great[6] harm to the winning A and B block bidders by delaying their entry into the market. Clearly, the Commission cannot have it both ways on the issue of injury.

C. The Minority Petitioners Are Likely to Prevail on the Merits of Their Application for Review

Given that the balance of hardships tips decidedly in favor of the Minority Petitioners, they need only show that they have raised questions going to the merit so serious, substantial, difficult and doubtful as to make them a fair ground for further litigation and thus for more deliberative investigation. Holiday Tours, 559 F.2d at 884. However, the Minority Petitioners have a substantial likelihood of prevailing on the merits of their application for review. The Minority Petitioners have shown above that the Commission's refusal to stay the issuance of licenses to the winners of the A and B block auctions constitutes a violation of its statutory obligations.

The Commission has repeatedly acknowledged in the development of its auction rules that the statutory obligation to disseminate licenses among businesses owned by members of minority groups was imposed by Congress in recognition of the fact that minorities require added safeguards in the auction process to assure that they will have a reasonable opportunity to compete with the larger dominant carriers. See generally, Fifth R&O, 9 FCC Rcd at 5536, 5571-5581. When the Commission adopted its rules establishing the bidding criteria for the C and F frequency blocks, the Commission stated that the special rules applicable to those blocks were adopted because they were

[6] While claiming that a delay in the granting of A and B block licenses would cause injury, the June 23, 1995 Order does not assert that this injury would be irreparable. Under the balance of the hardships test, this silence has great significance.

needed to enable minorities and other designated entities to compete with the larger companies expected to bid in the A and B blocks. Id. at 5571. As noted above, even after modifying the C block rules on July 18, 1995, the Commission expressed confidence that, under the modified rules, minorities and women somehow still will "have a better chance of becoming successful PCS providers."

The record of this proceeding clearly demonstrates that the large carriers who prevailed in the A and B block auctions have many existing competitive advantages over minorities. 9 FCC Rcd at 5571-5579. The provision of any additional competitive advantages to the A and B block winners by the Commission is contrary to the Commission's statutory obligations. The decisions to deny the CommOne Motion and the May 12, 1995 Application for Review amount to giving the A and B block winners an excessive competitive advantage and will result in a concentration of licensees in the hands of the A and B winners.

The Bureau Chief denied the Motion of CommOne in spite of the existence at that time of the Court of Appeals stay which prevented the commencement of C block auction. In denying that Motion, the Bureau Chief stated: "We disagree with CommOne's suggestion that the possibility of a delay of the C block auction presents a new circumstance that the Commission did not previously consider." CommOne Order at 3. The Bureau Chief then added: "To the contrary, the Commission's decision to proceed with the first phase of PCS licensing before subsequent auctions were conducted or scheduled demonstrates that it considered prompt licensing of PCS to be paramount even though the timing of future auctions remained unknown." Id. In the June 23, 1995 Order, the Bureau Chief refused to alter this erroneous conclusion.

The Bureau Chief's interpretation of the Commission's prior orders in the CommOne Order and the June 23, 1995 Order suggests that the Commission has no regard for whether minorities and other designated entities were provided any meaningful opportunity to compete with the A and B block winners. The Bureau Chief suggested that the issue of when the C block auctions would be held for the C block was irrelevant to the Commission's decision to conduct the A and B block auctions. The Bureau's CommOne Order and June 23, 1995 Order simply are contrary to the Commission's prior orders in this proceeding.

In disregarding the potential impact of a substantial head start afforded by the Commission to the A and B block licensees, the Bureau Chief has failed to acknowledge the Commission's statutory obligation under Section 309(j). The Commission could have complied with this obligation by providing incentives for minorities to participate in all auctions, including the A and B auctions. As noted above, such a plan of action was specifically proposed by NABOB at the earliest stages of this proceeding. NABOB Comments, filed November 10, 1993, at 9-10. However, the Commission rejected NABOB's proposal, and decided instead to comply with its statutory mandate in only certain frequency blocks. Fifth R&O, 9 FCC Rcd at 5536.

The Commission's decision to restrict the frequency blocks in which it will seek to comply with its statutory mandate is likely to result in the denial of any meaningful opportunity for minorities to obtain any economic opportunity in broadband PCS. For the Commission to proceed with the licensing of A and B block frequencies before it is in a position to license C block frequencies is a clear abdication of its statutory obligation to "avoid excessive concentration of licenses" in the hands of the A and B block winners, and to "disseminate" licenses to, and "promote economic opportunity" for minorities. See Section 309(j). The Minority Petitioners therefore are likely to prevail on the merits of their application for review.

D. A Stay Will Serve the Public Interest

A grant of the requested stay will serve the public interest by furthering the statutory obligation of the FCC to promote participation in PCS by minorities and other Designated Entities. Congress has determined that it is in the public interest for minorities to be given "meaningful opportunity" to participate in PCS. As the preceding sections of this Application for Review have demonstrated, there is a substantial public interest benefit being furthered by Congress in its requirements that the FCC: (1) avoid excess concentration of licenses, (2) disseminate licenses to businesses owned by members of minority groups and (3) promote economic opportunity for businesses owned by members of minority groups. A grant of the requested stay is essential for the intent of Congress to be fulfilled. The CommOne Order and the June 23, 1995 Order illegally ignore these mandates of Congress and concentrate solely on one mandate: the "Congressional directive to promote the development and rapid deployment of PCS for the benefit of the public with a minimum of administrative or judicial delay."

Congress did not give the Commission the power to concentrate on only one of its stated mandates to the exclusion of the other mandates it established. The failure of the CommOne Order and the June 23, 1995 Order to take into account and to carry out the additional mandates of Congress, including the mandate to promote the dissemination of licenses to businesses owned by members of minority groups and to promote economic opportunity for businesses owned by members of minority groups constitute a clear violation of Section 309(j). Only a grant of the instant Application for Review and the grant of a stay will enable the Commission to fulfill its statutory obligations.

E. The Minority Petitioners Have Satisfied the Four Prong Holiday Tours Test For the Granting of a Stay

As demonstrated above, once it is determined that the balance of the hardships tips decidedly in favor of the Minority Petitioners, they need not show with mathematical precision a probability that they will succeed on the merits. It is enough that they show that they have ". . . raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Holiday Tours, 559 F.2d at 884. That they clearly have done.

The Minority Petitioners have shown that Congress has established a policy requiring the Commission to promote the economic opportunity of a wide variety of applicants, including businesses owned by members of minority groups, by disseminating licenses among a wide variety of applicants, including businesses owned by members of minority groups. 47 U.S.C. § 309(j).

The Minority Petitioners also have shown that the bidding results of the A and B block auctions have the classic characteristics of a "territorial allocation," an unfair business practice under the antitrust laws. May 12, 1995 Application for Review at 11-15.

At a minimum, the Minority Petitioners have shown that there is a serious, substantial and difficult question as to whether the Commission's decision to conduct the A and B block auctions first, taken together with the delays in the start of the C block auction, will have the effect of totally frustrating this Congressional policy of promoting economic opportunity for the members of minority groups and the dissemination of licenses among businesses owned by members of minority groups. Also, there is strong circumstantial evidence that raises a substantial question of whether there was anticompetitive conduct by A and B block auction winners. At a minimum, these questions are sufficiently serious, substantial, difficult and doubtful as to make them fair ground for litigation, and thus for more deliberative investigation. Holiday Tours, 559 F.2d at 844.

The Minority Petitioners have demonstrated that, under the four part Holiday Tours test, the Commission should grant their Application for Review. Therefore, the Commission should grant a stay of the issuance of licenses to the A and B block auction winners.